

## PROSPECTIVE SUPREME COURT VACANCY

Mr. SPECTER. Mr. President, I have sought recognition to comment briefly about the prospective vacancy in the Supreme Court of the United States with the resignation of Justice Stevens. I do so to urge the President to select a nominee without regard to any threats of a filibuster. I urge the President to make his selection of whom-ever he believes to be the best qualified to handle the responsibilities with a view to academic excellence, professional experience, and intellect to carry on the battle, where we have seen the Supreme Court veer very sharply to the right.

Let's be candid about the Supreme Court being an ideological battleground today. That happens to be the fact. When some decry judicial activism, what could be more judicial activism than reversing the 100-year precedent that corporations may not engage in political advertising, as the Supreme Court did in *Citizens United*, in a contortion of procedural maneuverings to take a case with an isolated issue with a predetermined obvious purpose of changing the law on that very vital subject for the operation of our democracy?

We had Chief Justice Roberts, in the confirmation proceedings, under oath, swear he would not, quote, "jolt the system." Well, there have been quite a number of jolts in the system with his key vote. We had a very extensive questioning and commentary about Chief Justice Roberts' deference to congressional fact-finding. Only Congress has hearings, hears witnesses, and makes determinations of fact-finding. When the voting rights came up, all of that seemed to have been forgotten.

We have a situation where it is obvious the Supreme Court makes the cutting-edge decisions on the law of the land. The Supreme Court, it turns out, decides who will be President in *Bush v. Gore*—a decision strictly along political partisan lines.

The Supreme Court of the United States decides what will be the law with respect to campaign finance reform, as we seek to make a determination as to how we can limit the expenditures in political campaigns—the very core of the democratic process.

In *Buckley v. Valeo*, in 1976, the Supreme Court said that, under the First Amendment, speech equals money. It seemed to me at the time that was a farfetched decision. Now, with *Citizens United*, we find that corporations are somehow persons, somehow entitled to first amendment rights and can advertise in political campaigns.

The Supreme Court decides who will live and who will die, decides what is the extent of the death penalty. The Supreme Court decides the extent of a woman's right to choose—*Casey v. Planned Parenthood*. The Supreme Court decides about the power of the State to take private property in eminent domain. And so the cases go on and on and on.

I have sought, for more than a decade now, to have the Supreme Court televised, and twice during my tenure as chairman or ranking member of the Judiciary Committee the committee reported out favorably legislation to require the Supreme Court to be televised, unless there was some extraordinary circumstance invoked by the Court. More recently, in this Congress, I have modified that effort with legislation which recommends that the Supreme Court televise its proceedings.

When *Bush v. Gore* came up, then-Senator BIDEN and I wrote to Chief Justice Rehnquist urging that the Court allow that monumental case to be televised so the public could see it, considering the very limited number of people who could gain access.

When I went over to the Court that day—being one of the few who could gain access to the Court—the block was surrounded with television cameras because of so much public interest. But the cameras could not go inside. That day the Supreme Court, with the Chief Justice's order, did change practice and allowed an audio transcript to be released immediately thereafter.

I believe Congress has the authority, should it choose to do so, to direct the Supreme Court to permit its proceedings to be televised. The Supreme Court, in a series of cases, has said the public has a right to know what is going on inside the courtroom, and that was the case which involved *Richmond Newspapers*. Well, in an electronic era, where the public gets so much of its information via television or via radio, there ought to be that access.

But the Congress has the authority to determine when the Court starts to function each year: the first Monday in October. Congress sets a quorum for the Court: six. Congress can set the number of Justices on the Court, as evidenced by the effort by President Franklin Roosevelt in the mid to late 1930s to increase the number of the Supreme Court to some 15.

Obviously, we cannot tell the Supreme Court what to decide, how to decide, but we can tell them about administrative matters. And the Congress has the authority to tell the Court which cases to take. So there is a broad range of matters where the Congress cannot act.

I modified the effort I had to have the Supreme Court televised—instead of "requiring it" to "recommending it"—because in the final analysis the Court can make a determination on separation of powers if Congress imposes a requirement that can be overruled by the Court.

But if the public had access to what was going on in the Supreme Court, it seems to me there would be a clamor to have more openness, more transparency, and greater public appreciation of the fact that the Supreme Court is a battleground.

When considerations are made about—as the Sunday talk shows have

filled the airwaves just yesterday—a number of Senators from the other side of the aisle left the filibuster on the table, would not rule it out, the question of what is judge-made law. Well, that is very much in the eye of the beholder as to what is judge-made law.

But I would urge the President not to pay any heed to that. When we start to engage in the subtleties of a nominee who will be among the five instead of the four, I suggest that is a stretch beyond making any determination. That is, I believe—well, it was candidly said trying to persuade Justice Kennedy to be among five, as it is speculated with some pretty solid foundation that Justice Stevens succeeded in persuading Justice Kennedy to side on the issue of habeas corpus.

We had *Rasul v. Bush*, where Justice Stevens—in a very learned opinion, tracing the authority of detention from the Magna Carta down through habeas corpus—made a determination that habeas corpus was a constitutional right. The case then came to the Court of Appeals for the District of Columbia, and in a contorted opinion—at least contorted in my judgment—the Circuit Court for the District of Columbia said it was on statutory grounds and not constitutional grounds. But reading *Rasul v. Bush*, starting with the Magna Carta and tracing the constitutional evolution, it certainly, as a fair reading would say, was on constitutional grounds.

Then *Boumediene v. Bush* came up, and on the petition for cert, only three Justices voted to hear the case, and Justice Stevens was not among them. Had Justice Stevens voted to hear the case, there would have been four Justices to take up the case and it would have been docketed and it would have been heard. But Justice Stevens voted not to hear the case. It was speculated at that time widely that Justice Stevens felt if the Court took the case habeas corpus would be rejected.

We had the long fight on the floor of this body, and I offered an amendment to restore habeas corpus, which was defeated 51 to 48 on the military commissions act. I predicted at that time the Supreme Court would eventually overrule the congressional determination and reinstate habeas corpus as a constitutional right.

Then there came to light information in the military commissions about some very questionable practices, and there was a subsequent petition for reconsideration for a grant of cert. On a petition for reconsideration on a grant of cert, it takes five votes. Four votes are insufficient. You have to have five votes to have cert granted and cert was granted. Justice Stevens and Justice Kennedy joined the other three Justices in the petition for reconsideration to grant cert.

In *Boumediene v. Bush*, the Supreme Court said that habeas corpus, in fact, was a right. Well, those are speculative and those are subtleties. But my own thinking on the subject is the President ought to appoint somebody who